72-824

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-824

BOARD OF EDUCATION OF THE CITY OF PLEASANT GROVE,
Petitioner,

versus

LINDA STOUT, ET AL., JEFFERSON COUNTY BOARD OF EDUCATION,
and THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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The Board of Education of the City of Pleasant Grove, Alabama, prays that a Writ of Certiorari issue to review that portion of the judgment of the United States Court of Appeals for the Fifth Circuit entered September 7, 1972, applicable to Petitioner.

OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Fifth Circuit dated September 7, 1972, not yet reported, is printed below at Appendix page A-1. The opinion dealt with four separate appeals on a consolidated basis. The case here involved is No. 71-2979.

2. The several decrees and orders of the United States District Court for the Northern District of Alabama from which the appeal by petitioner was taken to the Court of Appeals have not been reported, and are included in the Appendix at pages A-9, A-12, A-14, A-18, and A-22. The decrees in these consolidated cases dealt at great length with issues as to other school districts not here involved. Only the portions of the decrees relevant to Pleasant Grove are reproduced.

QUESTIONS PRESENTED

1. Whether the courts below were justified in ordering, in effect, the dissolution of an independent school district legally created under state law, the creation and operation of which is admittedly consistent with the governing principles as to school desegregation, merely in order to enforce a decree directing the board to purchase and operate school buses for the sole purpose of bringing negro pupils from outside the district in order to maintain an arbitrary racial balance.

2. Whether an independent school district can be required to spend funds beyond its fiscal means to acquire and operate buses for the sole purpose of transporting pupils from outside the district in order to maintain a racial balance.

STATEMENT OF THE CASE

This petition presents a novel issue among the multitude of factual and legal problems which the numerous desegregation cases have presented.

The school desegregation suit, of which this controversy is a part, was commenced in 1965 against the Jefferson County school system, of which at that time the Pleasant Grove schools were a part. Pleasant Grove was incorporated as a municipality in 1936. Its population (5600) is

predominantly white. In a series of orders the District Court directed the newly created Pleasant Grove system to admit to its schools all black students living within an area of two miles who desired to attend the schools. The court also ordered Pleasant Grove to construct additional facilities in order to accommodate black students. In response to that decree the City levied an additional property tax and a new sales tax to provide financing for new school buildings at an initial cost in excess of $600,000.

As a result of continuing proceedings in the cases, the District Court, on August 24, 1971, ordered the consolidation of an area outside of the City into the Pleasant Grove School District, and in this order, for the first time, directed that the City provide transportation for any pupils living more than two road miles from the schools. The City had never owned or operated school buses and the testimony showed without dispute that its available funds were inadequate to support the purchase and operation of a transportation system without substantial adverse affect on the school budgets.

The areas ordered to be incorporated outside the City limits of Pleasant Grove were composed almost wholly of blacks and the order to incorporate them and to furnish transportation was for the sole purpose of creating and maintaining a racial balance in Pleasant Grove Schools. Pleasant Grove did not, and does not, object to incorporation of the outside area into its school system, nor to the admission of black students residing in the incorporated area or elsewhere. Its position as to transportation was that it did not have the facilities, funds or personnel to operate such a system and that such transportation could and should readily be furnished by the Jefferson County system which had for many years operated a large and well organized bus system.

By its orders dated September 8, 14, 18 and 24 (Appendix A-9, A-12, A-14, A-18 and A-22) the District Court directed that Pleasant Grove acquire and operate a transportation system on penalty of forfeiture of its entire school system. Upon failure of Pleasant Grove to acquire and operate buses, the District Court by its final order of September 24, 1971 (Appendix A-22) undertook to transfer the properties, facilities and personnel of the Pleasant Grove System to the Jefferson County Board of Education.

The Fifth Circuit sustained the order, with a reservation that the transfer of the system should not be regarded as permanent. As to this it stated:

> Sovereignty should be returned when Pleasant Grove demonstrates to the district court's satisfaction by clear and convincing evidence that it is able and intends to comply with the court's orders concerning its role in the desegregation of the Jefferson County School District. When that showing is made, then the court should withdraw its prior order, but with the clear understanding that it will be reinstated should the district's commitment to desegregation falter.

ARGUMENT

The decree of the District Court directing the final and unconditional transfer of all the properties of the Pleasant Grove School District to the Jefferson County School System represents an unprecedented intrusion by a federal court into a state's financial and political structure. The Pleasant Grove School District was established pursuant to state law, and the validity of its creation under that law has not been questioned in this case or elsewhere.

No authority in the state, administrative or judicial, would have the power under state law to make the order which was entered by the district court. The effect of the order was not only to transfer ownership and control of school properties of a value in excess of $2 million, but necessarily involved the assignment of the proceeds of local taxes, voted in accordance with state law by the citizens of Pleasant Grove, to the control of county authorities, and perhaps more importantly, the disruption or complete destruction of the administrative organization of the Pleasant Grove Board.

There was no finding by the district court or by the court of appeals that the continued ownership of these properties by Pleasant Grove and operation of its independent school system was in any way a violation of the obligation to maintain a unitary non-segregated school system.

Neither court below has said or intimated that the formation of this so-called "splinter" school district was "motivated by a purpose of or had the effect of avoiding the implementation of a unitary school system" within the reach of **Swann v. Charlotte-Mecklenburg Board of Education**, 402 U. S. 1; **Wright v. Emporia**, ... U.S. ..., or **U. S. v. Scotland Neck**, ... U. S. ..., the decisions relied upon by the Court of Appeals for its judgment here. The

decrees with respect to Pleasant Grove and the other separate districts involved in the appeal below in fact dealt with the racial composition of the schools as if they were a part of the Jefferson County system. Pleasant Grove did not appeal from this aspect of the decree and takes no exception to it. The district court decrees did not purport to abolish the other separate districts and transfer their properties, personnel, administration and funds to the County as it did in the case of Pleasant Grove. This drastic order as to Pleasant Grove was solely punitive or coercive in nature with respect to the narrow issue of whether Pleasant Grove should be compelled to acquire and operate a transportation system for black pupils living outside its district.

This question does not arise if, as we insist, the court below should not have ordered Pleasant Grove to acquire and operate a transportation system for the benefit of county pupils. If that order is nevertheless sustained, we urge the Court to remand this aspect for reconsideration of this hasty, harsh and indeed confiscatory decree.

This is not just a case of exercise of the power of the court to enforce its decrees. We do not admit that the Pleasant Grove Board were in wilfull contempt of court when this order was entered. They had been presented with an improper, unnecessary and arbitrary "election", which they were still attempting to resolve before the court when they were cut off. The Board specifically disclaimed any election to abandon and convey its system and properties. The order was entered without any hearing as to its scope and terms, and was final and not conditioned upon compliance with the busing order or other action by the Board or others.

In addition to the sweeping confiscation of all of the cash and property of the Pleasant Grove school system, the abrupt injection into this order, without previous

suggestion or notice, of the mandate that taxes levied under State law by a municipality be paid over to a different subdivision of the State must surely be unique, even in the legal chaos of these school cases.

The result of this unprecedented decree is to punish, not the possible majority of the Board whom the court might conceivably have found contumacious after a proper hearing, but the citizens and taxpayers of Pleasant Grove. If the court had, after hearing, given an opinion or order affording the municipal authorities or the voters an opportunity to respond to any recalcitrance on the part of the Board, the matter could unquestionably have been resolved. No such opportunity was afforded by a decree which purported irrevocably and finally to transfer title to the properties from their public owners, and even to transfer the levy and collection of taxes from the city to the county—all in complete disregard of state law.

This was judicial over-kill. It was not necessary, it was premature, it was arbitrary, and it was inapt. If punishment was in order—we say it was too early—the wrong people were penalized.

The modification of the decree by the Fifth Circuit so as to require the District Court to re-transfer the system upon a showing of compliance is only a partial and inadequate recognition of the injustice of the decree. A more temporary and far less burdensome taking of property has been invalidated by this court as a denial of due process. **Fuentes v. Shevin**, 407 U.S. 67, 40 LW 4692 (1972).

The damage done by the taking of an entire school system for an indeterminate period is obviously to a large extent irreparable, not only as to the loss of the use of valuable property, but in the loss of the Superintendent, and the destruction of the whole administrative mechanism of local control.

The case thus presents in many respects the situation involved in the Richmond School case now pending on petition for certiorari in this court in No. 72-549, **Richmond School Board v. Virginia Board of Education.** In that case the Court of Appeals of the 4th Circuit held that a U. S. District Court could not compel the restructure of governmental agencies of a state for the purpose of achieving racial balance in the public schools. **Bradley v. School Board of City of Richmond, Virginia,** 462 F.2d 1058 (1972). The decree there reversed was held to be contrary to the decisions of this Court in **Swann v. Charlotte-Mecklenburg Board of Education,** 402 U. S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), and **Spencer v. Kugler,** 326 F.Supp. 1235 (D.N.J. 1971), aff'd mem. 404 U. S. 1027, 92 S.Ct. 707, 30 L.Ed.2d 723 (1972).

In view of the close similarity of the issues here presented with those presented by the petition in the **Richmond** cases, supra, involving the fundamental and extremely sensitive question of unnecessary interference by federal courts with state political subdivisions, it is suggested that the Court may wish to consider this petition in conjunction with No. 72-549.

Respectfully submitted

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Certificate of Service

I certify that service in accordance with Rule 33 has been made by mail on counsel of record for all parties in the court below.

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